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THE PSYCHOTHERAPIST-PATIENT PRIVILEGE IN CHILD PLACEMENT: A RELEVANCY ANALYSIS

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I. INTRODUCTION

IN ANY CHILD PLACEMENT DECISION,¹ the predominant consideration is the welfare of the child.² Accordingly, the most widely used test in determining child custody is clearly the "best

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1. A state's right to make child custody determinations is recognized under the theory of *parens patriae*, which confers upon the state the role of protector of the children within its jurisdiction. See, e.g., Brosky & Alford, *Sharpening Solomon's Sword: Current Considerations in Child Custody Cases*, 81 DICK. L. REV. 683, 684-85 (1977); Garvey, *Child, Parent, State, and the Due Process Clause: An Essay on the Supreme Court's Recent Work*, 51 S. CALIF. L. REV. 769, 786 (1978); Comment, *Child Custody: Best Interests of Children vs. Constitutional Rights of Parents*, 81 DICK. L. REV. 733, 734 (1978). One early Pennsylvania case explained the state's power as follows:

[M]ay not the natural parents, when unequal to the task of education, or unworthy of it, be superseded by the *parens patriae*, or common guardian of the community? . . . That parents are ordinarily intrusted with it is because it can seldom be put into better hands; but where they are incompetent or corrupt, what is there to prevent the public from withdrawing their faculties, held, as they obviously are, at its sufferance? *The right of parental control is a natural, but not an alienable one.*

Ex Parte Crouse, 4 Whart. 9, 11 (Pa. 1839) (emphasis added) (upholding state's right to place children in house of refuge).

2. See, e.g., Bertin & Klein, *Pennsylvania's Developing Child Custody Law*, 25 VILL. L. REV. 752, 760 (1980); Oster, *Custody Proceeding: A Study of Vague and Indefinite Standards*, 5 J. FAM. L. 21, 21 (1965); Sayre, *Awarding Custody of Children*, 9 U. CHI. L. REV. 672, 677-78 (1942); Comment, *Measuring the Child's Best Interests - A Study of Incomplete Considerations*, 44 DEN. L.J. 132, 132-33 (1967); Comment, *supra* note 1, at 733.

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interests of the child" standard.³ Despite its relatively old vintage,⁴ the standard continues to represent a nebulous concept that courts have rarely been able to define with precision.⁵ Because of its open-ended nature, the best interests of the child standard makes relevant a wide range of evidence pertaining to the fitness of the parents and the environment in which the child will be raised.⁶ It is in determining these facts that child placement cases often seek and rely heavily on the testimony of court-appointed or privately-retained psychotherapists.⁷

3. See Lauerman, *Nonmarital Sexual Conduct and Child Custody*, 46 U. CIN. L. REV. 647, 652 (1977); Sayre, *supra* note 2, at 677-78. The principle underlying the best interest rule is that neither parent has a presumptive right to the custody of the child. Comment, *supra* note 2, at 133.

4. The earliest expression in American case law of a primary concern for the well-being of the child appears to be the Pennsylvania Supreme Court's decision in *Commonwealth v. Addicks*, 5 Binn. 520 (Pa. 1813). The first clear articulation of the best interests of the child standard, however, has been credited to Judge Cardozo, who stated:

The Chancellor . . . does not proceed upon the theory that the petitioner, whether father or mother, has a cause of action against the other or indeed against any one. He acts as *parens patriae* to do what is best for the interest of the child. He is to put himself in the position of a "wise, affectionate, and careful parent," and make provision for the child accordingly. . . . He is not adjudicating a controversy between adversary parties, to compose their private differences. He is not determining rights "as between a parent and a child," or as between one parent and another. . . . Equity does not concern itself with such disputes in their relation to the disputants. Its concern is for the child.

Finlay v. Finlay, 240 N.Y. 429, 433-34, 148 N.E. 624, 626 (1925), *quoting* Queen v. Gyngall, [1893] 2 Q.B. 232, 241 (Esher, M.R.). For other early cases expressing a paramount concern for the well-being of the child, *see, e.g.*, *United States v. Green*, 26 F. Cas. 30 (C.C.D.R.I. 1824) (No. 15,256); *Kelsey v. Green*, 69 Conn. 291, 37 A. 679 (1897); *Chapsky v. Wood*, 26 Kan. 650 (1881); *Sheers v. Stein*, 75 Wis. 44, 43 N.W. 728 (1889).

5. See, *e.g.*, R. SLOVENKO, *PSYCHIATRY AND LAW*, 362 (1973); Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROB. 226, 227 (Summer 1975).

The best interests of the child standard has been codified in many state statutes. See, *e.g.*, ALASKA STAT. § 09.55.205 (1979); DEL. CODE ANN. tit. 13, § 722 (Supp. 1980); GA. CODE § 74-107 (1981). Even when statutorily articulated with specific factors for the court to consider, the standard, while somewhat more concrete, nonetheless has been characterized as "sweeping, slippery words which may say much and at the same time say nothing." R. SLOVENKO, *supra*, at 371. See also Comment, *supra* note 2, at 133-34.

At least one court has held that a standard of "the best interests and welfare of the child" is unconstitutionally vague, and therefore violates the due process requirements of the fourteenth amendment. See *Linn v. Linn*, — Nev. —, —, 286 N.W.2d 765, 769 (1980) (termination of parental rights action).

6. See, *e.g.*, R. SLOVENKO, *supra* note 5, at 371; Comment, *supra* note 2, at 134-42.

7. See R. SLOVENKO, *supra* note 5, at 361. A court's authority to appoint a psychotherapist is widely recognized. See, *e.g.*, *id.* at 372; Weihofen, *Testimonial Competence and Credibility*, 34 GEO. WASH. L. REV. 53, 75-76 (1965).

The use of psychotherapist testimony in child placement decisions can arise in at least five situations:⁸ 1) private custody actions, generally arising out of the dissolution of marriage;⁹ 2) child dependent and neglect or abuse actions, usually combined with a determination that the present custodian is in some way unfit;¹⁰ 3) termination of parental rights cases, where there is also the need for finding parental unfitness;¹¹ 4) guardianship cases;¹² and 5) disposition hearings subsequent to a determination of delinquency.¹³ The application of the best interests standard is quite similar in each situation as the court attempts to predict, based on the judge's best estimate, what will happen to the child.¹⁴ Necessarily, this type of inquiry opens to examination many facets of an individual's life.¹⁵

8. See generally Mnookin, *supra* note 5, at 232-46.

9. See, e.g., *Barker v. Barker*, 92 Idaho 204, 440 P.2d 137 (1968); *Usen v. Usen*, 359 Mass. 453, 269 N.E.2d 442 (1971); *D. v. D.*, 108 N.J. Super. 149, 260 A.2d 255 (1969). See generally Mnookin, *supra* note 5, at 232-37.

10. See, e.g., *In re Fred J.*, 89 Cal. App. 3d 168, 152 Cal. Rptr. 327 (1979); *In re Carthen*, 66 Ill. App. 3d 780, 384 N.E.2d 723 (1978); *In re Doe Children*, 93 Misc. 2d 479, 402 N.Y.S.2d 958 (1978).

11. See, e.g., *In re Crooks*, 262 N.W.2d 786 (Iowa 1978); *Allen v. Department for Human Resources*, 540 S.W.2d 597 (Ky. 1976); *State ex rel. Juvenile Dep't v. Martin*, 19 Or. App. 28, 526 P.2d 647 (1974). See generally Comment, *Parental Incapacity as a Standard for Involuntary Termination of Parental Rights*, 52 TEMP. L.Q. 814 (1979).

In Pennsylvania, judges are statutorily empowered to terminate parental rights permanently and free the child for adoption against a parent's wishes upon the parent's failure or inability to properly care for the child. See 23 PA. CONS. STAT. ANN. § 2511 (Purdon Supp. 1981-82). The best interests of the child standard is incorporated in the statute's mandate that the court "give primary consideration to the needs and welfare of the child." *Id.*

12. See Mnookin, *supra* note 5, at 237-40. Guardianship actions generally arise when neither of a child's parents is alive or available and a nonparent seeks custodial rights. *Id.* at 238.

13. See, e.g., *In re B.*, 482 Pa. 471, 394 A.2d 419 (1978); *Rusecki v. State*, 56 Wis. 2d 299, 201 N.W.2d 832 (1972). For discussion of *In re B.*, see notes 170-75 & 229-31 and accompanying text *infra*.

14. One judge has described the difficult task of child custody adjudications as follows:

These contested child custody cases are never easy From the nature of such disputes, involving as they do one of the basic instincts and great primal urges of human existence, whichever way judges rule is bound to leave a trail of heartache and pain. But decide them we must, for it is our job. . . .

Bowler v. Bowler, 355 Mich. 686, 694, 96 N.W.2d 129, 133 (1959).

15. One commentary has suggested that "the modern child custody contest usually entails more complex facets than were mentioned in the oft-quoted Old Testament account of King Solomon's award of the custody of an infant to its real mother." Brosky & Alford, *supra* note 1, at 683, citing 1 Kings 3:23. See also H. CLARK, DOMESTIC RELATIONS 572 (1968).

Under these circumstances, the mental conditions of not only the proposed custodian but also that of the child becomes material.¹⁶ In many situations, however, the parties will seek to exclude testimony by asserting a psychotherapist-patient privilege.¹⁷ This creates a fruitful area for conflict over the privilege's applicability.

Most often, the attempted exclusion of psychotherapist testimony has been based on a statutory privilege and has been unsuccessful.¹⁸ Increasingly, an alternative assertion has been that the privilege may be part of the constitutional right of privacy.¹⁹ The position of this article is that the decision of whether to recognize a psychotherapist-patient privilege, when based on traditional privilege analysis, leads to a confusing analytic framework burdened with exceptions.²⁰ Furthermore, whether based on a statutory privilege or a constitutional right of privacy, an analysis premised on logical relevancy is more helpful.²¹ Indeed, such an approach may be required to protect the constitutional right of privacy.

The article focuses first on the statutorily-recognized psychotherapist-patient privilege, including a history of its evolution, a discussion of its use in child-placement cases, and a proposal for an appropriate analytical approach to the privilege issue based on logical relevancy. The latter part of the article examines the constitutional right to privacy as it applies to the privilege, including a review of pertinent judicial decisions and a discussion of a proposed analytical approach in the constitutional context.

II. STATUTORY PRIVILEGE

A. History and Scope

At common law, the attorney-client relationship was the only professional association protected by an evidentiary privilege.²² In

16. See, e.g., *Barker v. Barker*, 92 Idaho 204, 440 P.2d 137 (1968); *Moosa v. Abdalla*, 248 La. 344, 178 So. 2d 274 (1965); *Usen v. Usen*, 359 Mass. 453, 269 N.E.2d 443 (1971); *In re B*, 482 Pa. 471, 394 A.2d 419 (1978).

17. The privilege is the patient's, not the psychotherapist's. See 8 J. WIGMORE, EVIDENCE § 2386 (McNaughton rev. ed. 1961).

18. See section IIB *infra*.

19. See section IIIA *infra*.

20. For a discussion of the numerous exceptions recognized under traditional privilege analysis, see notes 47-123 and accompanying text *infra*.

21. See notes 124-45 and accompanying text *infra*.

22. See C. McCORMICK, LAW OF EVIDENCE § 87 (2d ed. 1972); 2 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 215 (1978); 8 J. WIGMORE, *supra* note 17, § 2286. The attorney-client privilege arose out of "a consideration for the oath

1828, the New York legislature enacted the first statutory recognition of the physician-patient privilege.²³ Since a psychiatrist is a physician specializing in the treatment of mental and emotional disorders, in theory there has been a limited psychotherapist privilege since the various states' adoption of statutory physician-patient privileges.²⁴ In addition, over two-thirds of the states presently

and the honor of the attorney rather than for the apprehension of his client." *Id.* § 2290 (emphasis in original). During the eighteenth century, however, that rationale gave way to the view, which still prevails today, that such a privilege is necessary to promote open and candid communication between an attorney and his client. 2 D. LOUISELL & C. MUELLER, *supra*, § 207; 8 J. WIGMORE, *supra* note 17, § 2290; Saltzberg, *Privileges and Professionals: Lawyers and Psychiatrists*, 66 VA. L. REV. 597, 604 (1980); Comment, *Privileged Communications: A Case by Case Approach*, 23 ME. L. REV. 443, 443-44 (1971). See also *Fisher v. United States*, 425 U.S. 391, 403 (1976). In *Fisher*, the Supreme Court stated:

The purpose of the privilege is to encourage clients to make full disclosure to their attorneys. As a practical matter, if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice.

Id. (citations omitted).

23. See N.Y. REV. STAT., pt. II, ch. VII, § 73 (1828). The statute provided:

[N]o person duly authorized to practice physic or surgery shall be allowed to disclose any information which he may have acquired in attending any patient, in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon.

Id., quoted in Comment, *supra* note 22, at 446 n.15. The New York statute was passed as a public health measure to combat the high incidence of "dreadful" diseases. *Id.* at 446. It was presumed that people would be more willing to seek medical treatment if they were protected from disclosure of their condition. See Slovenko, *Psychiatry and a Second Look at the Medical Privilege*, 6 WAYNE L. REV. 175, 178 (1960); Comment, *supra* note 22, at 446. Since the time of its adoption in New York, the physician-patient privilege has been subject to the criticism that it impedes a court's ability to determine the facts. Chief among the critics has been Wigmore. See 8 J. WIGMORE, *supra* note 17, § 2380a. See also C. McCORMICK, *supra* note 22, § 105; Chafee, *Privileged Communications: Is Justice Served or Obstructed By Closing the Doctor's Mouth on the Witness Stand?*, 52 YALE L.J. 607 (1943).

24. Several jurisdictions have a physician-patient privilege. See, e.g., ARIZ. REV. STAT. ANN. § 12-2235 (1956); CAL. EVID. CODE § 994 (West Supp. 1981); COLO. REV. STAT. § 13-90-107 (1973); D.C. CODE ANN. § 14-307 (1973); GA. CODE ANN. § 38-418(b) (Supp. 1979); HAWAII REV. STAT. § 621-20.5 (1976); IDAHO CODE § 9-203 (1979); IOWA CODE ANN. § 622.10 (West Supp. 1979-80); KAN. STAT. ANN. § 60-427 (1976); LA. REV. STAT. ANN. § 15-476 (West 1950); MICH. COMP. LAWS ANN. § 600.2157 (1968); MINN. STAT. ANN. § 595.02(4) (West 1947); MISS. CODE ANN. § 13-1-21 (1972 & Supp. 1979); MO. ANN. STAT. § 491.060(5) (Vernon Supp. 1980); MONT. REV. CODES ANN. § 26-1-805 (1979); NEV. REV. STAT. § 49.225 (1979); N.H. REV. STAT. ANN. § 329:26 (Supp. 1979); N.J. REV. STAT. ANN. § 2A-84A-22.2 (West 1976); N.Y. CIV. PRAC. LAW § 4504 (McKinney 1963); N.C. GEN. STAT. § 8-53 (1969); N.D. CENT. CODE § 31-01-06 (1976); OHIO

have enacted statutes which expressly extend the psychotherapist-patient privilege to other mental health practitioners besides the physician-psychiatrist.²⁵

Wigmore stated that four criteria must be satisfied to justify an evidentiary privilege: 1) the communication must result from a confidence that the information will not be divulged; 2) the protection must be essential to maintaining the relationship; 3) the relationship must be one which the community feels should be encouraged; and 4) disclosure of the information must cause a greater injury to the relationship than its benefit to the litigation.²⁶ Numerous commentators have related Wigmore's four elements to the psychotherapist-patient privilege, arguing that such a privilege

REV. CODE ANN. § 2317.02B (Page 1979); OKLA. STAT. ANN. tit. 12, § 2503 (West 1979); OR. REV. STAT. § 44.040(d) (1979); R.I. GEN. LAWS § 5-37.3-4 (Supp. 1980); UTAH CODE ANN. § 78-24-8 (1977); VT. STAT. ANN. tit. 12, § 1612 (Supp. 1978); WASH. REV. CODE ANN. § 5.60.060 (Supp. 1978); WIS. STAT. ANN. § 905.04 (West 1975); WYO. STAT. § 1-12-101 (1977).

The federal courts do not recognize a physician-patient privilege. See *United States v. Meagher*, 531 F.2d 752 (5th Cir.), *cert. denied*, 429 U.S. 853 (1976). A general physician-patient privilege also was rejected by the drafters of the Proposed Federal Rules of Evidence. See *Advis. Comm. Note to FED. R. EVID. 504*, *reprinted in* 56 F.R.D. 183, 241 (1972).

25. See, e.g., ALA. CODE § 34-26-2 (1977) (psychologist); ALASKA STAT. § 08.86.200 (1979) (psychologist or his associate); ARK. STAT. ANN. §§ 28-1001, 72-1516 (1979) (psychotherapist; psychologist or psychological examiner); CAL. EVID. CODE §§ 1012, 1014 (West 1966 & Supp. 1980) (psychotherapist); CONN. GEN. STAT. § 52-146(c), (f) (1979) (psychologist or psychiatrist); DEL. CODE ANN. tit. 24, § 3518 (1975) (psychologist); GA. CODE ANN. §§ 38-418, 84-3118 (1981) (psychiatrist; psychologist); IDAHO CODE § 54-2314 (1979) (psychologist); ILL. ANN. STAT. ch. 111, § 5306 (Smith-Hurd 1977) (psychologist); IND. CODE ANN. § 25-33-1-77 (Burns 1974) (psychologist); IOWA CODE ANN. § 622.10 (West Supp. 1980) (general "professional confidence" statute); KY. REV. STAT. §§ 319.111, 421.215 (1977) (psychologist; psychiatrist); LA. REV. STAT. ANN. § 13-3734 (West Supp. 1980) (health care professional); MD. CTS. & JUD. PROC. CODE ANN. § 9-109 (1980) (psychiatrist or psychologist); MASS. GEN. LAWS ANN. ch. 233, § 20B (West Supp. 1980) (psychotherapist); MICH. COMP. LAWS ANN. § 338.1018 (1976) (psychologist); MINN. STAT. ANN. § 595.02 (West Supp. 1980) (psychologist); MISS. CODE ANN. § 73-31-29 (1973) (psychologist); MO. ANN. STAT. § 337.055 (Vernon Supp. 1980) (psychologist); MONT. REV. CODES ANN. § 26-1-807 (1979) (psychologist); NEV. REV. STAT. § 49-225 (1973) (psychologist or psychiatrist); N.H. REV. STAT. ANN. § 330-A:19 (1966) (psychologist); N.J. REV. STAT. ANN. § 45:14B-28 (West 1978) (psychologist); N.M. STAT. ANN. § 61-9-18 (1978) (psychotherapist or psychologist); N.C. GEN. STAT. § 8-53.3 (1969) (psychologist); N.D.R. EVID. 503 (1981) (psychotherapist); OHIO REV. CODE ANN. § 4732.19 (Page 1977) (psychologist); OKLA. STAT. ANN. tit. 12, § 2503 (West 1979) (psychotherapist); OR. REV. STAT. § 44.040(h) (1979) (psychologist); 42 PA. CONS. STAT. ANN. § 5944 (Purdon 1980) (psychologist); R.I. GEN. LAWS § 5-37.3-4 (Supp. 1978) ("confidential health care information"); TENN. CODE ANN. §§ 24-1-207, 63-1117 (1977 & Supp. 1980) (psychiatrist; psychologist); UTAH CODE ANN. § 58-25-8 (Supp. 1979) (psychologist); WASH. REV. CODE ANN. § 18.83.110 (1978) (psychologist); WIS. STAT. § 905.04 (1975 & Supp. 1980) (psychologist); WYO. STAT. § 33-27-103 (1977) (psychologist).

26. 8 J. WIGMORE, *supra* note 17, § 2285.

should exist.²⁷ In turn, the widespread adoption of the privilege in one form or another indicates that the commentary has been persuasive with legislatures and courts.

Central to the theme of this commentary is the notion that the psychotherapist-patient relationship is one that society desires to foster and protect, and that without the confidentiality which the privilege provides, many people will not seek therapeutic help.²⁸ While there appears to be a myth that the mental health problem is expanding in this country²⁹ and that consulting a psychotherapist has become a middle-class fad,³⁰ there is still a belief that people react negatively upon learning that a person is undergoing psychotherapy.³¹ The likelihood of discouraging people from consulting a psychotherapist is even greater in child custody disputes, where the party who needs help may fear that confidences revealed during therapy will be used against them in later court appearances.³² In this regard, therefore, the psychotherapist-patient privilege is different, and perhaps more necessary, than the physician-patient privilege, since few people would avoid seeking medical help for fear of disclosure.³³

27. See, e.g., Fisher, *The Psychotherapeutic Profession and the Law of Privileged Communications*, 10 WAYNE L. REV. 609, 611 (1964); Slovenko, *supra* note 23, at 184; Comment, *Confidential Communication to a Psychotherapist: A New Testimonial Privilege*, 47 NW. L. REV. 384, 386-87 (1952); Comment, *The Psychotherapists' Privilege*, 12 WASHBURN L.J. 297, 302-05 (1973).

28. See note 27 *supra*.

29. See Comment, *The Psychotherapists' Privilege*, *supra* note 27, at 300-01. While the sense of an explosion in mental health problems may be more a result of increased awareness and confrontation than a reality, the numbers involved are still quite sobering. In 1973, for example, there were 5,249,000 reported episodes of mental health treatment, and in 1971, the total cost of mental health treatment was \$9.5 billion. Comment, *The Psychotherapist-Patient Privilege: Are Some Patients More Privileged Than Others?*, 10 PAC. L.J. 801, 802-03 (1979).

30. See London, *Psychotherapy Boom: From the Long Couch for the Sick to the Push Button for the Bored*, 8 PSYCH. TODAY 62 (June 1974).

31. Professor Slovenko has observed that "[u]nlike the patient suffering an organic illness, a person in psychotherapy, by and large, visits his psychiatrist with the same secrecy that a man goes to a bawdy house." Slovenko, *supra* note 23, at 188 n.46. While there appears to be little empirical data to indicate that publicity would discourage people from seeking help, there also seems to be general agreement that for psychotherapy to be effective, the confidentiality of disclosures must be assured. As stated by Robert M. Fisher: "The relationship is rendered ineffective either because a person is deterred from entering into it or because the person is frightened into non-disclosure during its course, and, that the effect of such an absence of the privilege is undesirable in light of the importance of the relationship to society." Fisher, *supra* note 27, at 611.

32. See notes 62-63 and accompanying text *infra*.

33. It is interesting to note that the original goal of the physician-patient privilege was to encourage people to seek help for "dreadful" diseases. See note 23 *supra*.

To determine whether a privilege protects the psychotherapist-patient relationship, the obvious first step is to ascertain whether any statute or rule of evidence applies to the psychotherapist³⁴ involved. Some statutory provisions are based on the physician-patient privilege; absent separate statutory coverage, these do not include psychotherapists other than psychiatrists.³⁵ Other statutes limit the privilege to the psychologist-patient relationship or encompass both psychologists and psychiatrists.³⁶ In a few states, a social worker privilege provides a broader scope of protection than any of the above three provisions.³⁷

As a result of the disparate scope of the privileges accorded to the various mental health practitioners, an anomalous situation has arisen in some states which have enacted more than one privilege statute.³⁸ When the language of the statutes differs, the psychologist-patient is often broader in scope than the physician-patient privilege.³⁹ The scope of the psychologist privilege, for example, may be defined as being the same as the attorney-client privilege,⁴⁰ while the physician privilege may be more narrowly drawn.⁴¹

34. As used in this article, the term "psychotherapist" refers to psychiatrists, psychologists, social workers, and other mental health practitioners.

35. See, e.g., CONN. GEN. STAT. ANN. § 52-146d (West Supp. 1981); GA. CODE ANN. § 38-418 (1981).

36. See note 25 *supra*.

37. See, e.g., CAL. EVID. CODE § 1010(c)-(e) (West Supp. 1981) (clinical social worker, school psychologist, and marriage, family and child counselor); N.J. STAT. ANN. § 45:8B-28 (West 1978) (marriage counselor); N.Y. CIV. PRAC. LAW § 4508 (McKinney Supp. 1980-81) (certified social worker).

Pennsylvania's Divorce Code contains a privilege provision which states: "Communications of a confidential character made by a spouse to an attorney, or a qualified professional, shall be privileged and inadmissible in evidence in any matrimonial cause unless the party concerned waives such immunity." PA. STAT. ANN. tit. 23, § 703 (Purdon Supp. 1981-82). The term "qualified professionals" is defined by the Divorce Code to include "marriage counselors, psychologists, psychiatrists, social workers, ministers, priests, or rabbis, or other persons who, by virtue of their training and experience, are able to provide counseling." *Id.* § 104. It has been stated, however, that "[a]lthough the scope of this privilege is unclear, it would seem that it is inapplicable to custody cases because . . . a custody dispute may not qualify as a 'marital cause'" Bertin & Kleim, *supra* note 2, at 764 n.95.

38. See Louisell, *The Psychologist in Today's Legal World: Part II*, 41 MINN. L. REV. 731, 739-40 (1957); Fisher, *supra* note 27, at 638-39.

39. See, e.g., Comment *supra* note 29, at 805-06; Comment, *supra* note 22, at 448.

40. See, e.g., IDAHO CODE § 54-2314 (1979); KY. REV. STAT. § 319.111 (1977); N.J. STAT. ANN. § 45:14B-28 (West 1978); OHIO REV. CODE ANN. § 4732.19 (Page Supp. 1980); 42 PA. CONS. STAT. ANN. § 5944 (Purdon 1980).

41. In Pennsylvania, for example, the psychologist privilege reads as follows:

No person who has been licensed . . . to practice psychology shall be, without the written consent of his client, examined in any civil

Since all psychotherapists, psychiatrists as well as nonphysicians, perform services which are essentially similar in nature,⁴² and all rely on the trust and confidence of their patients,⁴³ a statute which excludes one or more types of practitioners is inconsistent. A more desirable approach would be to enact a statute which adopts a functional definition of the class to which the privilege is to apply.⁴⁴

or criminal matter as to any information acquired in the course of his professional services in behalf of such client. The confidential relations and communications between a psychologist and his client shall be on the same basis as those provided or prescribed by law between an attorney and client.

42 PA. CONS. STAT. ANN. § 5944 (Purdon 1980). Communications to psychiatrists, on the other hand, are protected by the physician-patient privilege, which states:

No physician shall be allowed, in any civil matter, to disclose any information which he acquired in attending the patient in a professional capacity, and which was necessary to enable him to act in that capacity, which shall tend to *blacken the character* of the patient, without consent of said patient, except in civil matters brought by such patient, for damages on account of personal injuries.

42 PA. CONS. STAT. ANN. § 5929 (Purdon 1980) (emphasis added).

The statutory requirement that a communication, to be privileged, must be such that its disclosure would tend to "blacken the character" of the patient has been narrowly interpreted by the Pennsylvania courts. See *Miller v. Colonial Refrigerated Transp. Inc.*, 81 F.R.D. 741, 743 (M.D. Pa. 1979), citing *Skruch v. Metropolitan Life Ins. Co.*, 284 Pa. 299, 302, 131 A. 186, 186 (1925) (patient must be suffering from some "loathsome disease"). For discussion of *Miller*, see note 229 *infra*. The physician-patient privilege is further qualified by the provision that the physician may disclose information acquired in civil matters brought by the patient for damages on account of personal injuries, an exception which is not found in the psychologist-patient privilege statute.

For general discussion of the history and policy of the two privileges, compare 8 J. WIGMORE, *supra* note 17, §§ 2290-91 (attorney-client) with *id.* §§ 2380-80a (physician-patient).

42. "Psychotherapy" has been defined as:

A method or system of alleviating or curing certain forms of disease, particularly diseases of the nervous system or such as are traceable to nervous disorders by suggestion, persuasion, encouragement, the inspiration of hope or confidence, the discouragement of morbid memories, associations, or beliefs, and other similar means addressed to the mental state of the patient without (or sometimes in conjunction with) the administration of drugs or other physical remedies.

BLACK'S LAW DICTIONARY 1104 (5th ed. 1979).

43. Many commentators have voiced the view that there is a demonstrable need and a sound rationale for confidentiality of communications between clients and mental health professionals. See, e.g., Guttmacher & Weihofen, *Privileged Communications Between Psychiatrist and Patient*, 28 IND. L.J. 32, 34-36 (1952); Louisell & Sinclair, *Reflections on the Law of Privileged Communications: The Psychotherapist-Patient Privilege in Perspective*, 59 CALIF. L. REV. 30, 52-55 (1971); Slovenko, *supra* note 23, at 184-96; Comment, *supra* note 29, at 802-04; Comment, *The Psychotherapists' Privilege*, *supra* note 27, at 303-04.

44. Fisher has described the class as those persons "seeking help in the solution of a mental problem caused by psychological and/or environmental pressures from another whose training and status are such as to warrant other

Rather than providing protection based on the specific training of the individual involved, the statute should extend the same evidentiary privilege to *all* client-practitioner relationships founded on a psychotherapeutic function.⁴⁵ A psychotherapist-patient privilege is essential to all such relationships, for, as Professor Slovenko has stated:

The very essence of psychotherapy is confidential personal revelations about matters which the patient is and should be normally reluctant to discuss. Frequently, a patient in analysis will make statements to his psychiatrist which he would not make even to the closest member of his family. The process involves prying into the most hidden aspects of personality, a prying which discloses matters theretofore unknown even to the conscious mind of the patient.⁴⁶

B. Application of the Statutory Privilege

Despite the existence of some type of psychotherapist-patient privilege in most jurisdictions, the prevailing rule in child placement hearings is that the privilege does not prevent disclosure of the testimony or records of a psychotherapist. Following traditional privilege analysis, a majority of the courts addressing the question have developed an analytically weak group of exceptions to the privilege which, taken together, have virtually swallowed the rule. The exceptions can be classified according to five interrelated rationales: 1) the requested information was obtained by an examination for a purpose other than diagnosis or treatment; 2) the party waived the privilege; 3) the therapist had an explicit statutory duty to report the information; 4) the party introduced his or her mental condition into controversy; and 5) the best interests of the child override the claim of privilege.

1. Examination for Purpose Other than Diagnosis or Treatment

The first of these exceptions, arising when the psychotherapist-patient relationship results from an examination involving neither diagnosis nor treatment, is consistent with the underlying rationale of the privilege. The basis of the privilege is that the full beneficial effect of the relationship can not be attained if the patient fears that persons confiding in him for the purpose of such help." Fisher, *supra* note 27, at 617.

45. See, e.g., Fisher, *supra* note 27, at 637-41; Comment, *supra* note 29, at 820; Comment, *The Psychotherapists' Privilege*, *supra* note 27, at 310-11.

46. Slovenko, *supra* note 23, at 184-85.

revelations to the psychotherapist during the course of treatment will be disclosed.⁴⁷ When the relationship is initiated for the purpose of examination only, the basis for the privilege is absent, since the patient should be aware of its limited purpose and the possibility of its subsequent disclosure.⁴⁸ This exception is widely accepted and has been applied in civil, criminal, and child placement cases.⁴⁹ In addition, many of the statutes creating the privilege proscribe its application when an examination is court-ordered.⁵⁰

2. Waiver

The second exception involves finding a waiver of the privilege by the patient.⁵¹ The clearest case of waiver is a signed release executed by the patient.⁵² A waiver has also been found where a party agreed to the appointment of a neutral psychologist,⁵³ and when a party did not object when a court granted an adversary the opportunity to seek information from a psychotherapist.⁵⁴

No fault can be found with this exception as long as the waiver is knowingly made. In some cases, however, the waiver has been anything but explicit. *In re Fred J.*,⁵⁵ for example, involved a custody dispute between the mother of two minor children and the California Department of Public Assistance. The children were

47. See notes 28-33 and accompanying text *supra*.

48. See, e.g., *United States ex rel. Edney v. Smith*, 425 F. Supp. 1038, 1044 (E.D.N.Y. 1976); *Lindsay v. Lipson*, 367 Mich. 1, 4-5, 116 N.W.2d 60, 62-63 (1962). See generally C. McCORMICK, *supra* note 22, § 99; 8 J. WIGMORE, *supra* note 17, § 2383.

49. See, e.g., *Massey v. State*, 226 Ga. 703, 704-05, 177 S.E.2d 79, 81 (1970) (criminal); *Lindsay v. Lipson*, 367 Mich. 1, 4-5, 116 N.W.2d 60, 62-63 (1962) (civil); *Rusecki v. State*, 56 Wis. 2d 299, 316-18, 201 N.W.2d 832, 842-43 (1972) (juvenile delinquency adjudication).

50. See, e.g., CONN. GEN. STAT. ANN. § 52-146f(d) (West Supp. 1981); FLA. STAT. ANN. § 90.503(4)(b) (West 1979); KY. REV. STAT. § 421.215(3)(b) (1972).

51. Since the privilege is the patient's, not the psychotherapist's, the psychotherapist cannot assert the privilege if it has been waived by the patient. 8 J. WIGMORE, *supra* note 17, § 2386. See also *Commonwealth ex rel. Romanowicz v. Romanowicz*, 213 Pa. Super. Ct. 382, 385, 248 A.2d 238, 240 (1968).

52. See *In Re Hochmuth*, 251 N.W.2d 484, 490 (Iowa 1977).

53. *State ex rel. Juvenile Dep't v. Black*, 19 Or. App. 493, 497, 528 P.2d 130, 132 (1974).

54. *Critchlow v. Critchlow*, 347 So. 2d 453, 454 (Fla. App. 1977). For discussion of *Critchlow*, see notes 79-88 and accompanying text *infra*. Cf. FED. R. CIV. P. 35(b)(2) (requesting and obtaining report of examination waives privilege regarding other examinations of same condition).

55. 89 Cal. App. 3d 168, 152 Cal. Rptr. 327 (1979).

declared dependents of the county juvenile court, but initially were permitted to remain in the custody of their mother.⁵⁶ Subsequently, removal petitions were filed by the Department of Public Assistance, and the court ordered that the minors be taken from their mother.⁵⁷ While the children were in the mother's custody, she had them examined by two private psychiatrists, rejecting a social worker's suggestion that the children be taken to the county mental health clinic.⁵⁸ At the removal hearing, the trial court permitted the privately retained psychiatrists to testify over the mother's and the children's objections.⁵⁹ On appeal by the mother, the court held that to the extent that the mother might have had a privilege, she had waived it by her disclosure or consent to disclosure of the communications.⁶⁰ The fact that the mother had signed releases authorizing one of the psychiatrists to disclose information to various social agencies, and had, on two occasions, directed him to send reports to such agencies, was found to constitute a waiver.⁶¹

The reasoning in *Fred J.* appears sound if analyzed under traditional privilege analysis. Once the privileged communication is divulged to anyone, whether deliberately or by accident, the privilege no longer exists.⁶² The concern with applying traditional analysis in this type of case, however, is that it discourages action which is beneficial to the children — obtaining needed psychotherapy. Under these circumstances, reliance on a signed general waiver may actually be contrary to the best interests of the child since the protection of confidential psychotherapist-patient communications, with its attendant encouragement to seek help, may better serve the best interests of the child in the long run. This is especially true whenever the psychotherapist is privately retained, as in *Fred J.*, since the patient's expectation of privacy is greater

56. *Id.* at 172, 152 Cal. Rptr. at 328.

57. *Id.* at 172-73, 152 Cal. Rptr. at 328. The petitions, filed eight months after the initial order, sought to modify the earlier order on the ground that the mother had not effectively provided for the minors' welfare. *Id.*

58. *Id.* at 178, 152 Cal. Rptr. at 332.

59. *Id.* At the hearing, although attorneys for both the mother and the children objected, only the mother appealed. *Id.* at 178-79, 152 Cal. Rptr. at 332.

60. *Id.* at 179, 152 Cal. Rptr. at 332. The court expressed doubt, but did not decide, whether the mother would have had a privilege to object, separate from that of the children, absent her waiver. *Id.*

61. *Id.*

62. See, e.g., C. McCORMICK, *supra* note 22, § 101; 8 J. WIGMORE, *supra* note 17, § 2381.

in such a case than when a social worker, the court's agent, arranges for the therapy.⁶³

3. *Therapist's Duty to Report*

A third exception to the privilege arises when the psychotherapist has a legal duty to report the information. This most commonly occurs in child abuse actions. Indeed, a majority of the states have enacted statutory provisions which expressly adopt the exception.⁶⁴

4. *Mental Condition in Controversy*

The fourth, and perhaps the most common, rationale for denying an evidentiary privilege in placement determinations is that the proceedings are such that the mental condition of the parties is an issue. This circumstance, known as the "tender exception," is recognized by both the case law,⁶⁵ and statutory provisions.⁶⁶

The rationale for the tender exception is derived from what has been called the "patient-litigation exception." Simply stated, the latter exception provides that if a party puts his physical or mental condition into issue, such as in a suit for personal injuries, he cannot then preclude an opposing party's inquiry into that condition by asserting a privilege.⁶⁷ This exception has been uniformly applied as a justification for broad discovery of mental and

63. For discussion of other cases focusing on the issue of privately-retained psychiatric help, see notes 79-80 & 99-104 and accompanying text *infra*.

64. See, e.g., ALA. CODE § 26-14-3(a) (1975); FLA. STAT. ANN. § 827.07(4) (West 1976); R.I. GEN. LAWS § 5-37.3-4(b)(4) (Supp. 1978). See generally Light, *Abused and Neglected Children in America: A Study of Alternative Policies*, in THE RIGHTS OF CHILDREN 198, 203 (1974); Paulsen, Parker & Adelman, *Child Abuse Reporting Laws — Some Legislative History*, 34 GEO. WASH. L. REV. 482 (1966).

65. See *In Re Lifschutz*, 2 Cal. 3d 415, 467 P.2d 557, 85 Cal. Rptr. 829 (1970). For discussion of *Lifschutz*, see notes 166-69 and accompanying text *infra*.

66. See, e.g., MD. CTS. & JUD. PROC. CODE ANN. § 9-109 (1980); MASS. GEN. LAWS ANN. ch. 233, § 20B (West Supp. 1980).

67. See, e.g., 8 J. WIGMORE, *supra* note 17, § 2389; Louisell & Sinclair, *supra* note 43, at 41-43. An apt description of the tender exception rationale has been articulated by the California Supreme Court:

The whole purpose of the [physician-patient] privilege is to preclude the humiliation of the patient that might follow disclosure of his ailments. When the patient himself discloses those ailments by bringing an action in which they are in issue, there is no longer any reason for the privilege. . . . He cannot have his cake and eat it too.

City of San Francisco v. Superior Court, 37 Cal. 2d 227, 232, 231 P.2d 26, 28 (1951).

physical examinations under Rule 35(a) of the Federal Rules of Civil Procedure⁶⁸ and its state counterparts.⁶⁹

While this exception has been widely accepted, its interpretation has been anything but consistent. The major problem is determining what actions constitute placing the treated condition in issue.⁷⁰ A Massachusetts statute, for example, states that the mental condition of the child and of the proposed custodian *may* be issues in the child placement decision.⁷¹ Several other states define the standard to make the mental condition of the parties necessarily an issue.⁷²

Several Florida decisions present an interesting example of the difficult task of grappling with the common law rule in custody cases that the psychotherapist-patient privilege is waived if the issue of a party's mental condition is raised. In *Roper v. Roper*,⁷³ a dissolution of marriage action in which both parents sought custody of their minor children, the wife appealed from an order requiring her psychiatrist to testify at a discovery deposition.⁷⁴ Reversing that order, the Fourth District Court of Appeal of Florida con-

68. Rule 35(a) provides:

When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

FED. R. CIV. P. 35(a).

69. See, e.g., CAL. CIV. PROC. CODE § 2032 (West Supp. 1981); ILL. ANN. STAT. ch. 110A, § 215(a) (Smith-Hurd Supp. 1981-82).

70. Most obvious is the situation of psychiatric or medical treatment directly related to the alleged incident for which the party is seeking recovery — the classic example being the malpractice suit in which the patient cannot allege that the physician or therapist caused damage and then deny him the opportunity to refute the allegations by asserting the physician-patient privilege. See, e.g., *Post v. State*, 580 P.2d 304 (Alaska 1978); *State v. Ramirez*, 116 Ariz. 259, 569 P.2d 201 (1977).

71. See MASS. GEN. LAWS ANN. ch. 233, § 20B(e) (West Supp. 1981) (trial judge, in exercise of discretion, determines that psychotherapist has evidence bearing on ability to provide suitable custody).

72. See, e.g., DEL. CODE ANN. tit. 13, § 722(a)(5) (Supp. 1980) (to determine best interests of the child, court shall consider mental and physical health of all individuals involved); D.C. CODE ANN. § 16-2353(b)(2) (Supp. 1978) (in involuntary termination of parental rights cases, judge shall consider physical, mental, and emotional health of all individuals involved to degree that welfare of the child affected).

73. 336 So. 2d 654 (Fla. App. 1976).

74. *Id.* at 655-56.

cluded: "The psychiatrist-patient privilege would be seriously compromised if a treating psychiatrist could be required to testify against his patient in any divorce proceeding where the issue of child custody [is] raised."⁷⁵ The court stressed that although the mental condition of a parent is relevant in determining the best interests of the children, a party seeking custody does not thereby waive the psychiatrist-patient privilege.⁷⁶ Recognizing a need to maintain a balance between determining the mental health of the parents and maintaining confidentiality between a treating psychiatrist and his patient, the court held that as an alternative to breaching the privilege, the wife could be ordered to submit to a compulsory psychiatric examination.⁷⁷ Addressing the issue of when one's mental condition is raised, the *Roper* court indicated that if the wife had offered testimony of her treating psychiatrist to prove her parental fitness, then she would have waived her psychiatrist-patient privilege.⁷⁸

A year after *Roper*, the Third District Court of Appeal of Florida also addressed the waiver issue in a similar case. In *Critchlow v. Critchlow*,⁷⁹ a wife's petition for dissolution of marriage alleged that she was a fit and proper person to have custody of the couple's child.⁸⁰ After the wife's subsequent commitment to a hospital for psychiatric treatment, the husband sought custody of the child because of his wife's mental condition.⁸¹ Thereafter, the parties agreed to the appointment of a psychiatrist to examine the husband, wife, and child, and render a professional opinion as to which party was best suited to have custody.⁸² The wife had also stipulated to an agreement authorizing the deposition of her childhood physician, and failed to object to a court order authorizing

75. *Id.* at 656. The court reasoned that successful therapy and treatment were dependent upon the psychiatrist's ability to assure his patient of confidentiality. *Id.*

76. *Id.*

77. *Id.* at 657. Rejecting the husband's assertion that the treating psychiatrist's testimony would be more probative, the *Roper* court noted that Florida's tribunals have "long relied upon the testimony of court-appointed psychiatrists to determine a person's mental condition." *Id.* at 656.

78. In so finding, the court was construing a Florida statute providing: "There shall be no privilege . . . [when] the patient introduces his mental condition as an element of his claim or defense." *Id.* See FLA. STAT. ANN. § 90.242(3)(b) (1975).

79. 347 So. 2d 453 (Fla. App. 1977).

80. *Id.* at 454.

81. *Id.* The husband amended his original counter petition, which had not challenged his wife's prayer for custody of their child. *Id.*

82. *Id.*

depositions of her treating psychiatrists.⁸³ After the husband was awarded temporary custody of the child, however, the wife sought and obtained a protective order against taking the depositions.⁸⁴

In reversing the lower court, the appellate court held that the wife had waived any privilege with respect to the testimony of her treating psychiatrists and childhood physician by stipulating to one of the depositions and failing to object to the court orders authorizing the others.⁸⁵ The wife's statement in her petition that she was a fit person, combined with her agreement to an examination by a psychiatrist, was seen as a tender by the wife of the issue of her mental condition within the statutory exception.⁸⁶ The *Critchlow* court distinguished *Roper* on the ground that in the later case the wife's voluntary commitment had made her mental health highly relevant to a determination of the best interest of the child, and, under such circumstances, the psychiatrist-patient privilege could not be invoked.⁸⁷

While it is difficult to assess the weight accorded this reasoning, given the holding that there was clearly a waiver, it is of value to note that in determining when the issue of a party's mental health is raised, *Critchlow* looked to the generalized allegations in the petition and to stereotyped stigma attached to former patients of mental hospitals.⁸⁸ The problem with concluding that the mental health of a party becomes relevant once there has been a voluntary commitment to a mental hospital is that it presupposes that one's past mental condition in some way affects parental abilities. This is not necessarily true.

The fact of a party's commitment to a mental hospital would not normally be privileged information.⁸⁹ Absent a determination that the commitment in some way relates to the individual's parental abilities, blanket disclosure penalizes him for seeking help. This is exactly what the privilege was meant to avoid. Indeed, a compelling reason for the adoption of the first physician-patient privilege was to encourage people to seek help.⁹⁰

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 454-55. For the text of Florida's psychiatrist-patient privilege, see note 78 *supra*.

87. 347 So. 2d at 455.

88. *Id.* at 454-55.

89. See C. McCORMICK, *supra* note 22, § 100.

90. See note 23 *supra*.

The court's reliance on the allegations of the petition that the mother was unfit is also questionable. As a practical matter, there is little difference between such reliance and the situation in which a mother's petition states that she is fit, thus avoiding waiver of the privilege. Almost assuredly, during either direct or cross-examination of the mother, an affirmative statement of fitness is going to be made, a fact which is clearly material and necessary. It makes little sense to base a legal distinction on whether fitness is first mentioned at trial or in a petition, or by the petitioner or the respondent.

The difficulty with the *Roper* and *Critchlow* analysis is seen in the third of the Florida cases, *Mohammad v. Mohammad*,⁹¹ in which the First District Court of Appeal of Florida attempted to reconcile *Roper* and *Critchlow*. In *Mohammad*, a divorce and custody action, a husband sought either to examine the psychiatric records of his wife or call her psychiatrist as a witness.⁹² The wife sought to invoke the psychiatrist-patient privilege.⁹³ Stating that while it agreed with the decision in *Critchlow*, where the party's mental condition was clearly in issue, the court concluded that that was not the case in *Mohammad*.⁹⁴ The difference, according to the court, was that in *Critchlow* the mother alleged that she was a fit person and was subsequently admitted to a mental hospital, while in *Mohammad* the husband raised the issue of his wife's mental condition in his original petition.⁹⁵ The court held that the wife's denial of unfitness did not raise the issue, and thereby waive the privilege, reasoning that the privilege would be meaningless if the opposing party could in this manner always inject the issue into litigation.⁹⁶

Mohammad seems to follow a logical approach, but ultimately has the same shortcoming as *Critchlow*. Practically speaking, it makes no difference when the issue is raised or by whom. Whether the mother filed the petition or not, a parent's mental condition is always material, and, as will be discussed below,⁹⁷ some alternate method should be employed to determine whether that issue can be raised. Who has custody of the child before litigation is often unrelated to the child's best interests. But under the rationale of

91. 358 So. 2d 610 (Fla. App. 1978).

92. *Id.* at 612. The trial court did make available the reports of a court-appointed psychiatrist who had examined both parties. *Id.* at 611.

93. *Id.* at 612. The trial judge sustained the privilege, refusing to permit the psychiatrist to testify. *Id.*

94. *Id.* at 613.

95. *Id.* See note 81 and accompanying text *supra*.

96. 358 So. 2d at 613.

97. See section IIC *infra*.

Mohammad, the party having custody of the children needs only to remain silent and the issue of the party's mental fitness will be held not to have been raised.⁹⁸

Courts holding that the nature of child custody proceedings automatically constitutes a tender of the issue are more analytically consistent than the Florida line of cases. Typical of such cases is *Atwood v. Atwood*,⁹⁹ decided by the Kentucky Supreme Court. In *Atwood*, a couple with three children was divorced and custody of the children was awarded to the mother.¹⁰⁰ After the mother remarried, she, her new husband, and her new husband's son began consulting two private psychiatrists, and her first husband sought custody of his children.¹⁰¹ When her first husband proposed to take the psychiatrists' depositions, the mother moved for a protective order, invoking Kentucky's psychiatrist-patient privilege statute.¹⁰² The Kentucky Supreme Court affirmed the trial court's denial of the protective order, relying on later statutes which directed courts to examine the mental health of the parties and the children in a custody case.¹⁰³ The court stated that whenever custody is disputed, the persons involved subject themselves to "extensive and acute investigation," and that by seeking custody in the original divorce

98. An Illinois appellate court has reached a result similar to *Mohammad* in a case involving a child dependency action. See *In re Westland*, 48 Ill. App. 3d 172, 362 N.E.2d 1153 (1977). In *Westland*, a mother sought to exclude the testimony of a psychiatrist and psychiatric nurse. *Id.* at 174-75, 362 N.E.2d at 1155. In reversing the lower court's admission of the testimony, the court limited the exceptions to the psychiatrist-patient privilege to those expressly provided in the Illinois statute. *Id.* at 176-77, 362 N.E.2d 1156. One of those exceptions applies when a patient introduces his mental condition as an element of his case. See ILL. REV. STAT. ch. 51, § 5.2 (1975). By failing to apply this exception, the court implicitly rejected the attenuated analysis of cases holding that by seeking custody a party automatically raises the mental fitness issue. The *Westland* court also expressly rejected the argument that the best interests of the child override the psychiatrist-patient privilege. 48 Ill. App. 3d at 176-77, 362 N.E.2d at 1156. For an opposing view, see notes 99-105 and accompanying text *infra*. The court's blind adherence to a rigid rule of construction is no more sound, however, than blind adherence to a doctrine based upon who first raises the issue. In both instances, a relevancy analysis is more sound. See Slovenko, *Psychotherapist-Patient Testimonial Privilege: A Picture of Misguided Hope*, 23 CATH. L. REV. 649 (1974).

99. 550 S.W.2d 465 (Ky. 1976).

100. *Id.* at 465.

101. *Id.* at 466.

102. *Id.* See KY. REV. STAT. § 421.215 (1975).

103. 550 S.W.2d at 467. See KY. REV. STAT. §§ 403.270, .340 (Supp. 1980). The Kentucky Supreme Court concluded that the statutory exception to the psychiatrist-patient privilege, in which the patient introduces his mental condition as an element of his claim or defense, had been met by operation of law by the passage of a statute dealing with award of custody. 550 S.W.2d at 467.

action, the mother had placed her mental condition in issue.¹⁰⁴ An affirmative statement of fitness by the party was not necessary under this automatic tender analysis.

The Kentucky court's analysis is more sound than the Florida courts', but an even better approach would be to cast the issue as one of materiality¹⁰⁵ rather than as a tender exception. The inquiry in a custody dispute is so wide-ranging that, under the traditional factors which determine materiality, the mental condition of the parent would always be material.¹⁰⁶ The issue, therefore, is not really one of tender.

5. *Child's Best Interests Override the Privilege*

Once it is recognized that the emotional condition of a potential custodian is always material, a more productive inquiry can begin and the basic question of whether the privilege should apply in this type of case can be addressed directly. For those desiring to deny the privilege, this would at least lead to a more intellectually sound basis for denial; it could be said that the nature of the proceeding is such that concern for the welfare of the child simply outweighs any policy justification for the privilege.

Recognition that honoring the privilege would conceal information important to the determination of the case is the fifth basis for an exception to the privilege in placement decisions. This exception was adopted in the New York case of *Perry v. Fiumano*,¹⁰⁷ a custody proceeding in which a mother, whose son was in the custody of his father, sought the records of a certified social worker seen by the father.¹⁰⁸ Recognizing that the interests of the child were paramount, the court concluded:

104. 550 S.W.2d at 467.

105. Materiality involves the question of whether a given proposition is provable in a case. Whether a proposition is provable can depend on many different factors, such as pleadings, pretrial orders, stipulations, and statutes. Materiality does not depend on who brings the lawsuit, since a proposition can become material through responsive pleadings. See, e.g., C. McCORMICK, *supra* note 22, § 185; James, *Relevancy, Probability and the Law*, 29 CALIF. L. REV. 689, 692-93 (1941). See generally Weihofen, *supra* note 7, at 77.

106. See James, *supra* note 105, at 689-91.

107. 61 A.D.2d 512, 403 N.Y.S.2d 382 (1978). The *Perry* court noted that several lower courts have limited the privilege in cases involving the welfare and best interests of children. *Id.* at 517, 403 N.Y.S.2d at 385. See, e.g., *In re Clear*, 58 Misc. 2d 699, 296 N.Y.S.2d 184, *rev'd on other grounds sub nom.* *In re Klug*, 32 A.D.2d 915, 302 N.Y.S.2d 418 (1969); *In re DoVidio*, 56 Misc. 2d 79, 288 N.Y.S.2d 21 (1968); *People ex rel. Chitty v. Fitzgerald*, 40 Misc. 2d 966, 244 N.Y.S.2d 441 (1963).

108. 61 A.D.2d at 515-16, 403 N.Y.S.2d at 384. The court noted that since the counseling center which the father had attended provided the services of

[I]t is [not] an impermissible encroachment upon the legislative function to hold that where it is demonstrated that invasion of protected communications between a party, a physician, psychologist, or social worker is necessary and material to a determination of custody, the rule of privilege protecting such communications must yield.¹⁰⁹

The court also noted that elimination of the privilege altogether might influence a parent to forego needed psychiatric help, and thus required a balancing of the two considerations to determine if the importance of the information outweighed the privilege.¹¹⁰ To reconcile these conflicting concerns, the court held that the party seeking disclosure must make a showing of necessity beyond mere conclusory statements, a test which the mother failed to meet in *Perry*.¹¹¹

The reasoning of *Perry* was followed in the subsequent New York case of *State ex rel. Hickox v. Hickox*,¹¹² which involved a motion to quash a subpoena for the production of a mother's psychiatric records in a custody proceeding.¹¹³ Reversing the lower court's grant of the motion,¹¹⁴ the appellate court established the following factors for the trial judge to consider in deciding whether to release the information: 1) whether any psychiatric testimony has already been offered or proposed; 2) whether there has been a waiver of the privilege; and 3) whether the psychotherapy records are material and necessary or whether there is sufficient information without them.¹¹⁵

physicians, psychologists, and social workers, three district privileges were involved. *Id.*

109. *Id.* at 518-19, 403 N.Y.S.2d at 386.

110. *Id.* at 519, 403 N.Y.S.2d at 386. The court indicated a concern for the "chilling effects" of the possibility of later disclosure of confidences, and concluded that "these privileges may not cavalierly be ignored or lightly cast aside." *Id.*

111. *Id.* at 519-20, 403 N.Y.S.2d at 386-87.

112. 64 A.D.2d 412, 410 N.Y.S.2d 81 (1978).

113. *Id.* at 413, 410 N.Y.S.2d at 82.

114. *Id.* at 415, 410 N.Y.S.2d at 84. The court noted that the denial of a motion to quash is not the equivalent of an order of disclosure since a subpoena duces tecum merely requires that the requested records be brought to court so that the trial judge may take appropriate action with respect to disclosure. *Id.* at 413-14, 410 N.Y.S.2d at 82-83.

115. *Id.* at 415-16, 410 N.Y.S.2d at 84. This is similar to the approach taken by the New Jersey Superior Court in *D. v. D.*, 108 N.J. Super. 149, 260 A.2d 255 (1969). *D.* was a divorce and custody proceeding in which the husband sought medical and psychiatric records relating to his wife's hospital commitment. *Id.* at 151-52, 260 A.2d at 256. In response to the wife's assertion that the physician-patient privilege was absolute, the court stated that the interests of the children were paramount and that the privilege must yield to

Such an approach has more merit than one relying on a conclusion that the best interests of the child automatically outweigh any privilege. Indeed, *Hickox* suggests an analysis that could be applied to all five exceptions, and is similar to the approach embodied in Rule 35(a) of the Federal Rules of Civil Procedure.¹¹⁶ For an adverse party to be required to submit to a physical or mental examination under Rule 35(a), the mental or physical condition of the party must be in controversy and good cause must be shown.¹¹⁷

The in controversy requirement would seem to require more than mere materiality, perhaps affirmative allegations of emotional disability.¹¹⁸ The good cause showing, essentially the test adopted in *Hickox*, requires more than mere logical relevancy.¹¹⁹ Indeed, the test articulated by the *Hickox* court is very close to the United States Supreme Court's own interpretation of the good cause language of Rule 35(a) in *Schlagenhauf v. Holder*,¹²⁰ in which the Court stated:

[T]he "in controversy" and "good cause" requirements of Rule 35 . . . are not met by mere conclusory allegations of the pleadings — nor by mere relevance to the case — but require an affirmative showing by the movant that each condition as to which the examination is sought is really and genuinely in controversy and that good cause exists for

this higher concern. *Id.* at 152, 260 A.2d at 256-57. Thus, the husband was allowed to subpoena the documents. *Id.* at 152, 260 A.2d at 257. They were not to be made part of the record, however, but were limited in use to an inspection by the court. *Id.* The court also required a psychiatric evaluation to determine the present mental condition of the parties, and stated that if the wife refused to submit to the evaluation, it would deny her claim to the statutory privilege. *Id.* at 154, 260 A.2d at 257-58. The court wrote:

The court's primary concern is the welfare of infant children, and the need to resolve this issue in their best interests may outweigh policy reasons for certain technical rules of evidence where the court in its discretion can find no acceptable alternative and where the information sought is indispensable to a proper determination of the custody issue.

Id. Thus, as in *Hickox*, a good-cause showing was required for disclosure.

116. For the text of Rule 35 (a), see note 68 *supra*.

117. See note 68 *supra*.

118. It must, of course, be recognized that Rule 35(a) is concerned with examination, not treatment, and therefore the privilege would not apply. See notes 67-68 and accompanying text *supra*. The purpose behind Rule 35, however, calls to mind the present conflict between intrusion into a person's personal life and the need to obtain facts. See, e.g., 8 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE & PROCEDURE* 670-80 (1970); Barnett, *Compulsory Medical Examination Under the Federal Rules*, 41 VA. L. REV. 1059 (1955); *Developments in the Law — Discovery*, 74 HARV. L. REV. 940, 1022-26 (1961).

119. See notes 114-15 and accompanying text *supra*.

120. 379 U.S. 104 (1964).

ordering each particular examination. Obviously, what may be good cause for one type of examination may not be so for another. The ability of the movant to obtain the desired information by other means is also relevant.¹²¹

Some federal courts will deny a Rule 35(a) request if the information sought is available from other sources,¹²² thus, in essence, applying a necessity requirement similar to that espoused in *Hickox*.¹²³

C. Suggested Deductive Analysis

The fact that both the Rule 35 and *Hickox* tests are based on a requirement that something more than logical relevancy must be demonstrated suggests that relevancy analysis is a good place to begin in articulating an appropriate analytical approach to privileges.¹²⁴ Logical relevancy is the question of whether the existence of a given fact tends to prove a proposition before the court.¹²⁵ In other words, does the evidence make the conclusion towards which it is directed "more probable or less probable than it would be without the evidence"?¹²⁶ Judges and jurors generally use inductive reasoning to decide relevancy.¹²⁷ For example, their reasoning might be: C received burns while in the custody of M; M, therefore, is unfit to have custody.¹²⁸

It has been effectively shown, however, that logical relevancy is better evaluated by transforming inductive reasoning into deductive quasi-syllogistic form.¹²⁹ In such a transformation, not only are the evidence and conclusion explicitly stated, but so is the proposition towards which the evidence is offered. Assuming the existence of

121. *Id.* at 118. See 8 C. WRIGHT & A. MILLER, *supra* note 118, at 672-73.

122. See 8 C. WRIGHT & A. MILLER, *supra* note 118, at 673 n.51.

123. See note 115 and accompanying text *supra*.

124. This approach is also consistent with Professor Slovenko's position that privilege is really a question of relevancy because courts allow the intrusion in all circumstances. R. SLOVENKO, *supra* note 5, at 67.

125. C. McCORMICK, *supra* note 22, § 185. Logical relevancy must be distinguished from materiality. Logical relevancy is concerned with whether evidence is probative of a proposition, while materiality asks whether a proposition is properly provable in a particular case. For discussion of this distinction, see *id.*; James, *supra* note 105, at 690-92.

126. FED. R. EVID. 401.

127. Trautman, *Logical or Legal Relevance — A Conflict in Theory*, 5 VAND. L. REV. 385, 389 (1952).

128. See J. WIGMORE, *THE SCIENCE OF JUDICIAL PROOF* 9-46 (1937); James, *supra* note 105, at 694-700.

129. The seminal piece on the value of transformation is James, *supra* note 105, in which Professor James refuted Wigmore's position that transformation was not helpful. See *id.* at 694-99.

logical relevancy, such a transformation also enables an evaluation of probative weight, that is, how more or less probable does the evidence make the conclusion?¹³⁰

This transformation can be viewed in either of two ways: It can be characterized as one proposition towards which the evidence is directed, or it can be seen as a series of intermediate propositions leading to an ultimate conclusion.¹³¹ Viewing the transformation as one quasi-syllogism, one proposition is the minor premise. Taking the burn example, the following quasi-syllogism results:

When a child receives burns while living with his mother, it is likely that the mother is unfit to have custody.

C received burns while living with M.

M, therefore, is unfit to have custody.

Determination of logical relevancy rests on acceptance of the proposition which in the inductive form was left unstated. The question then becomes whether the evidence is probative of the proposition. From a logical standpoint, few could deny that the existence of burns makes it more or less probable that M is unfit to be a custodian. But, by questioning the validity of the proposition, the probative weight can also be examined.¹³² The closer the proposition, evidence, and conclusion come to a valid syllogism, the more probative is the evidence.¹³³ Clearly, if the proposition is phrased as "usually" the mother is unfit rather than "sometimes", the evidence is more probative.

The probative value, or certainty, can be increased or decreased by adding facts to the proposition. The existence of other testimony, therefore, will affect the probative weight of the evidence being considered.¹³⁴ For example, additional evidence might change the major premise to:

A child who receives cigarette burns on its buttocks while living with a mother who smokes usually has a mother who is an unfit custodian.

130. *Id.*

131. Compare *id.* with MORGAN, BASIC PROBLEMS IN EVIDENCE 183-88 (1961) and Trautman, *supra* note 127, at 389.

132. There would, of course, be an additional proposition that it is not in the best interests of the child to be in the custody of an unfit mother.

133. James, *supra* note 105, at 698-99.

134. *Id.* Another example from a different field would be a robbery case in which evidence that the defendant tried to escape when he was arrested was presented to the jury. With the defendant's attempted escape as the

The additional facts might very well make the evidence more probative, perhaps changing "likely" to "usually."

If we view the transformation as a series of intermediate propositions, the following can be stated based on the evidence of burns:

A child who has burns is likely to have been burned by someone.

A child who has been burned by someone is likely to have been burned by someone the child lives with.

A child who is burned by someone with whom the child lives has a custodian who either burned him or did not provide sufficient supervision to protect him.

A custodian who either burned the child or failed to supervise the child properly is unfit to have custody of a child.

The remoteness of the initial proposition from the final proposition goes to probative weight: the more remote the evidence and first proposition are from the final proposition, the less probative value the evidence has.¹³⁵ Again, probative weight can be increased or decreased by attacking the validity of each proposition by adding facts.

D. The Application of Deductive Analysis to the Psychotherapist-Patient Privilege

The deductive form of analysis has direct application to privileges. Those who would require blanket access to psychotherapists' records support a proposition that is analytically weak, and that provides little support for invading the psychotherapist-patient privilege. Assuming that the evidence sought to be introduced is a psychotherapist's records or testimony, the proposition is:

minor premise, the major premise is that a person who flees when arrested shows consciousness of guilt. The question then becomes whether the evidence, or minor premise, is probative of the proposition, or major premise. The more likely the proposition becomes, the more relevant is the evidence. For example, the evidence is more relevant if flight *always* shows consciousness of guilt than if flight only *sometimes* shows consciousness of guilt. The time between the robbery and the arrest may affect the certainty, as may the distance of the place of arrest from the scene of the robbery. For example, the evidence would be more probative if the arrest took place fifteen minutes after the robbery and one block away than if the arrest were three months later and in another city.

135. James, *supra* note 105, at 698-99.

A person who has undergone psychotherapy in the past is likely to have given information to the therapist that is relevant to his mental capacity to have custody of a child.

The question that then arises is whether the evidence is probative of the proposition. Viewed alone, the mere existence of a psychotherapist-patient relationship provides scant support for the existence of relevant information.

If this single proposition is broken into its intermediate components, the remoteness of the ultimate proposition is graphically illustrated. Beginning with the fact that someone has undergone psychotherapy, the propositions are:

A person who has undergone psychotherapy probably revealed information during therapy which reflects on his ability to have custody of children.

This information will probably be evaluated by the psychotherapist.

The therapist will probably record this evaluation.

This record will probably reflect present ability.

This record will probably be in a form useful to the court.

Viewed in either of these forms, the weakness of the justification for breaching the privilege can be seen because of the low probative weight of the evidence. But, as with all questions of relevancy, if we add facts to the proposition (major premise), we increase the probative value. The more likely the proposition, the more probative the evidence; when the proposition becomes 100 percent true, there is a deductive syllogism.

In this instance, additional facts of particular relevance might include whether the therapy was related to the child-parent relationship or whether the prior therapy is required to interpret present actions.¹³⁶ The proposition must have more certainty than that required for mere logical relevancy since, absent an explicit exception, the legislature has expressed a desire to protect the communication beyond mere relevancy.¹³⁷ In short, the necessary

136. The latter determination could be made through the use of a court-appointed psychotherapist. See notes 225-31 and accompanying text *infra*.

137. See *Neuman v. Neuman*, 377 A.2d 393, 398 (D.C. App. 1977) (construing Rule 35 good cause requirement as additional to relevancy requirement).

demonstration comes close to a Rule 35(a) good cause showing or to the New York test articulated in *Hickox*, which focuses on whether the disclosure is both "necessary and material."¹³⁸

The suggested deductive analysis not only facilitates a consistent approach to the privilege in general, but also helps to provide a more logical explanation of each exception. The treatment versus examination exception is perhaps the clearest example.¹³⁹ The information added to the proposition which justifies the breach of the privilege, or the good cause shown, is not information about past mental condition, but rather information pertaining to *present* mental condition. The examination focuses on specific questions concerning an individual's capacity to have custody, and there is general agreement that the examination is of benefit to the custody determination.¹⁴⁰ The analytic proposition actually becomes:

The records of a person who undergoes a psychological examination to determine his fitness to take custody of a child will contain information which will aid that determination.

This proposition comes much closer to always being true, and while the word "will" perhaps should be replaced by "probably" it is clear that the justification for breaching the privilege is substantial.

The implied waiver exception would also hold up under deductive analysis.¹⁴¹ Indeed, in many instances, the good cause showing would be satisfied by an implied waiver. When the waiver is implied from a release given to another agency, as in *In re Fred J.*,¹⁴² the fact that information was useful there, or at least that the party thought it would be, may very well add strength to the good cause

of Rule 26(b)). See also FED. R. Civ. P. 26(b), 35(a); notes 68 & 116-23 and accompanying text *supra*.

138. See notes 112-23 and accompanying text *supra*.

139. See notes 47-50 and accompanying text *supra*.

140. See R. SLOVENKO, *supra* note 5, at 363-75. But see E. FERSCH, LAW, PSYCHIATRY, AND THE COURTS 90-91 (1979). See generally Bradbrook, *The Role of Judicial Discretion in Child Custody Adjudication in Ontario*, 21 U. TORONTO L.J. 402 (1971).

141. An explicit waiver, of course, presents no problem since no objection regarding access would be raised, other than that the waiver was improperly obtained. There would still remain, however, the question of whether what was revealed was relevant to the suit. For discussion of the waiver exception, see notes 51-63 and accompanying text *supra*.

142. For discussion of *Fred J.*, see notes 55-63 and accompanying text *supra*.

showing.¹⁴³ For example, the proposition in *Fred J.* could be phrased:

When a parent has previously provided records to an agency which intended to aid the parent in providing care for her children, those records are likely to provide information which is helpful to the custody determination.

The above premise not only permits closer examination of the justification for the intrusion, but also suggests other evidence, such as the nature and function of the agency, which might increase the justification.

The duty exception, under which therapists are statutorily required to report certain information,¹⁴⁴ establishes a direct connection between the privileged information and the issue in controversy. Little basis exists for the argument that such information is unnecessary, since, at the time of reporting, the psychotherapist assumed that there would not be another source of information. Thus, under the proposed analysis, the proposition becomes one with strong justification for breaching the privilege:

A psychotherapist who discovers in the course of therapy that a child has been emotionally harmed by a parent is likely to have information relevant to the parent's fitness to have custody of the child.

The analytical problems surrounding tendering the issue are also clarified by deductive analysis, which presupposes the materiality of the mental condition of the proposed custodian. Therefore, the question of who raises the issue can be dismissed and attention turned to the logical relevancy questions. The question becomes, as discussed,¹⁴⁵ one of viewing the surrounding factors that potentially increase the probative value.

The concern with concealing relevant information as privileged needs little explanation. It is clearly founded on the recognition of the need for relevant information, and, as such, would be encompassed by the general approach to access to records.¹⁴⁶

143. See note 61 and accompanying text *supra*.

144. For discussion of the duty exception, see note 64 and accompanying text *supra*.

145. See section IIC *supra*.

146. See, e.g., *Whalen v. Roe*, 429 U.S. 589 (1976); *Lora v. Board of Educ. of N.Y.*, 74 F.R.D. 565 (E.D.N.Y. 1977). For discussion of *Whalen*, see notes 159-65 & 189-96 and accompanying text *infra*. For discussion of *Lora*, see notes 179-87 and accompanying text *infra*.

III. CONSTITUTIONAL PRIVILEGE

A. Constitutional Basis

Constitutional analysis of the psychotherapist-patient privilege has centered on whether the privilege is encompassed within the right to privacy. The constitutional right to privacy was first articulated in *Griswold v. Connecticut*,¹⁴⁷ in which the United States Supreme Court held invalid a law prohibiting the use of contraceptives.¹⁴⁸ The Court declared that the use of contraceptives fell within a "zone of privacy,"¹⁴⁹ and that Connecticut's statutory proscription was an unconstitutional invasion of that privacy right.¹⁵⁰

The United States Supreme Court has never directly addressed the question of whether the constitutional right to privacy applies to the psychotherapist-patient or physician-patient privileges. Several other courts which have confronted this issue, however, have held that the privilege is strictly a legislative creation and has no constitutional basis.¹⁵¹ The reasoning employed in these cases is that the privacy right recognized in *Griswold* applies to familial relationships, not the relationship between a psychotherapist and his

147. 381 U.S. 479 (1965). The *Griswold* decision has generated a great deal of writing on the constitutional right of privacy. See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 886 (1978); Fried, *Privacy*, 77 *YALE L.J.* 475 (1967); Parker, *A Definition of Privacy*, 27 *RUTGERS L. REV.* 275 (1974); Comment, *A Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decision*, 64 *CALIF. L. REV.* 1447 (1976). Comment, *Due Process Privacy and the Path of Progress*, 1979 *U. ILL. L.F.* 469; see also Comment, *The Privacy Act of 1974: An Overview and Critique*, 1976 *WASH. U.L.Q.* 667.

148. 381 U.S. at 480-86. The appellants in *Griswold* were a doctor and an executive of the Planned Parenthood League. *Id.* at 480. Both had been convicted of providing information and medical advice about contraceptives to married persons. *Id.*

149. *Id.* at 485. Justice Douglas' majority opinion stated that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from these guarantees" and that these "guarantees creates zones of privacy." *Id.* at 484.

150. *Id.* at 485. The basic analysis applicable to privacy cases was set forth in *Griswold*. The right of privacy is a fundamental right and, as such, requires a compelling state interest to justify any significant intrusion. Further, state regulation which invades the zone of privacy must be narrowly circumscribed to meet the state's interest. *Id.* See Henkin, *Privacy and Autonomy*, 74 *COLUM. L. REV.* 1410, 1421 (1974).

151. See, e.g., *State v. Enebak*, — Minn. —, —, 272 N.W.2d 27, 30 (1978); *Bremer v. State*, 18 Md. App. 291, 334, 307 A.2d 503, 529 (1973), cert. denied, 415 U.S. 930 (1974).

patient.¹⁵² A few courts, however, have found a constitutional basis for the psychotherapist-patient privilege.¹⁵³

Four questions must be addressed in analyzing whether the psychotherapist-patient relationship in child placement decisions is constitutionally protected under a right of privacy: 1) whether the relationship itself is within an area protected by the Constitution; 2) whether there has been an infringement of such a protected area; 3) whether a state interest exists which is sufficient to justify the intrusion; and 4) whether the intrusion was narrowly circumscribed.

1. Relationship Constitutionally Protected

Whether a particular activity is within the scope of the protection of the privacy right has been the central question addressed by the Supreme Court since *Griswold*. Areas receiving protection have included matters relating to marriage,¹⁵⁴ procreation,¹⁵⁵ contra-

152. See *Felber v. Foote*, 321 F. Supp. 85 (D. Conn. 1970). In *Felber*, a psychiatrist challenged the constitutionality of a state statute requiring medical practitioners to report the names of drug-dependent persons to the state. *Id.* at 86. The plaintiff claimed a violation of his right to privacy because of the interference with his practice of medicine and the conflict created between his professional duty and the demands of the statute. *Id.* at 87. The court found no analogy between those "spheres of privacy which have previously won constitutional protection" and that asserted by the plaintiff, and stated that there was no indication that *Griswold* was "intended to constitutionalize the privacy of other relationships, specifically that of physician and patient." *Id.* at 88-89. The plaintiff's due process contentions were also rejected since no specific deprivations of life, liberty or property were threatened. *Id.* at 89-90. See also *Moosa v. Abdalla*, 248 La. 344, 351, 178 So. 2d 273, 276-77 (1965) (child custody action; constitution does not guarantee physician-patient privilege); *Bremer v. State*, 18 Md. App. 291, 334, 307 A.2d 503, 529 (1973), *cert. denied*, 415 U.S. 930 (1974) (defendant in criminal proceeding had no constitutional right to privileged communication with psychiatrist); *State v. Enebak*, — Minn. —, —, 272 N.W.2d 27, 30 (1978) (testimony of doctor from state hospital at which defendant confined held properly admitted; physician-patient privilege is statutory rather than constitutional right and legislature may create exceptions).

153. See notes 166-87 and accompanying text *infra*.

154. See, e.g., *Boddie v. Connecticut*, 401 U.S. 371 (1971) (statute requiring payment of court costs as precondition to access to state courts unconstitutional denial of freedom of choice in marriage as applied to welfare recipients financially unable to pay costs of divorce action); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (statute prohibiting interracial marriage denied due process by restricting freedom of choice in marriage without compelling state interest).

155. See, e.g., *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (statute requiring spouse's consent to abortion unconstitutional); *Doe v. Bolton*, 410 U.S. 179 (1973) (procedural requirements of abortion statute invalidated as unnecessary restrictions of right of privacy); *Roe v. Wade*, 410 U.S. 113 (1973) (right of privacy encompasses woman's decision to terminate pregnancy). But see *H.L. v. Matheson*, 101 S. Ct. 1164 (1981) (state may require physician to notify parents of unemancipated, immature minor seeking abortion).

ception,¹⁵⁶ and decisions concerning child rearing and the education of one's children.¹⁵⁷ In addition, the privacy right has been extended to freedom from governmental surveillance and intrusion.¹⁵⁸ Beyond this, the outer limits of the right remain unclear.

The relation between the physician-patient privilege and the right of privacy was at issue in *Whalen v. Roe*.¹⁵⁹ In that case, the United States Supreme Court was faced with the question of whether a New York statute requiring a physician to report to the State Health Department each prescription written for a dangerous drug, including the name of the person for whom the prescription was written, violated the patient's right of privacy.¹⁶⁰ The Court stated that the privacy right includes the individual's interest in avoiding disclosure of personal matters and the interest in independence in making certain kinds of important decisions.¹⁶¹ While holding that New York's scheme did not constitute an impermissible invasion due to its incorporation of procedural safeguards designed to prevent unwarranted dissemination of the information,¹⁶² the Court did intimate that there was a privacy interest in the physician-

156. See, e.g., *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (statute allowing only pharmacists to sell contraceptives and prohibiting sales to persons under age 16 unconstitutional); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (right to use contraceptives applied to unmarried persons); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (statute restricting married persons' right to use contraceptives unconstitutional). For discussion of *Griswold*, see notes 147-50 and accompanying text *supra*.

157. See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (statute requiring children to be sent to public schools unreasonably interfered with parent's liberty); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (prohibition against teaching foreign language unconstitutionally infringed on liberty to make educational decisions).

While many of these cases preceded the *Griswold* decision and did not primarily rely on a privacy rationale, the Court has since cited them as examples of the reach of the privacy right. See *Roe v. Wade*, 410 U.S. 113, 152-53 (1973).

158. See *Katz v. United States*, 389 U.S. 347 (1967). In *Katz*, the Court stated:

[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

Id. at 351-52 (citations omitted).

159. 429 U.S. 589 (1976).

160. *Id.* at 592-93. The state's objective was to identify abuse in the prescription of certain drugs. *Id.* at 591-92. The patients claimed that disclosure of the information contained in the State Health Department computers would stigmatize them as "drug addicts." *Id.* at 595.

161. *Id.* at 599-600.

162. *Id.* at 593-95. The prescription forms were to be destroyed after five years. *Id.* at 593. The room in which the forms were kept was surrounded by

patient relationship which was of constitutional dimension.¹⁶³ Referring to individuals' interests in nondisclosure of personal matters and independence in decision making, two areas of constitutional protection, the Court stated that "the New York program does not, on its face, pose a significantly grievous threat to either interest to establish a constitutional violation."¹⁶⁴ The Court's reasoning can be interpreted as recognizing the existence of a doctor-patient privacy right, but as finding no infringement of the right under the circumstances. Indeed, as the *Whalen* Court stated:

We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files The right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures. Recognizing that in some circumstances that duty arguably has its roots in the Constitution, nevertheless New York's statutory scheme . . . evidences a proper concern with, and protection of, the individual's interest in privacy We simply hold that this record does not establish an invasion of any right or liberty protected by the Fourteenth Amendment.¹⁶⁵

The argument that the right to privacy in the physician-patient relationship implicit in the *Whalen* decision extends to the psychotherapist-patient relationship has been articulated in a series of recent decisions of other courts. The seminal case recognizing the existence of constitutional protection is *In re Lifschutz*.¹⁶⁶ In holding that the psychotherapist-patient privilege had been waived in a personal injury action because the plaintiff had placed his mental condition in issue,¹⁶⁷ the California Supreme Court expressed what has become the basic argument for extending the right of privacy to this relationship. Rejecting the assertion that the *Griswold* line

a wire fence and protected by an alarm system. *Id.* at 594. The statute prohibited disclosure of the identities of the patients, and violation was made a criminal offense. *Id.* at 594-95.

163. *Id.* at 605.

164. *Id.* at 600.

165. *Id.* at 605-06.

166. 2 Cal. 3d 415, 467 P.2d 557, 85 Cal. Rptr. 829 (1970). For discussion of *Lifschutz*, including its constitutional dimensions, see generally Louisell & Sinclair, *supra* note 43; Suarez & Hunt, *The Patient-Litigant Exception in Psychotherapist-Patient Privilege Cases: New Considerations for Alaska and California Since In Re Lifschutz*, 1 U.C.L.A.-ALASKA L. REV. 2 (1971).

167. 2 Cal. 3d at 439, 467 P.2d at 573, 85 Cal. Rptr. at 845.

of cases covered only family relationships, the *Lifschutz* court stressed that the *Griswold* principle had an "open-ended quality"¹⁶⁸ which extended beyond marital relations to a broad spectrum of interpersonal relationships including that of the psychotherapist and his patient.¹⁶⁹

The Pennsylvania Supreme Court, in *In re B*,¹⁷⁰ also addressed the issue of whether a constitutional right of privacy protects the psychotherapist-patient relationship,¹⁷¹ but failed to agree on a majority approach to the subject.¹⁷² An opinion written by the late Justice Manderino stated that the right of privacy protects certain "intimate relationships," such as family, marriage, and motherhood.¹⁷³ Justice Manderino continued, indicating that the right extends to other situations, such as the doctor's office, when necessary to safeguard the right as it applies to those intimate relationships.¹⁷⁴ Emphasizing the intimate nature of the psychotherapeutic process and the expectations of privacy which are therefore present, Justice Manderino asserted that the individual's right of privacy must prevail over the need of the court to obtain information.¹⁷⁵

The only other state supreme court decision affording the psychotherapist-patient relationship constitutional protection under a privacy right involved a state constitution. In *Falcon v. Public Offices Commission*,¹⁷⁶ the Alaska Supreme Court held that a conflict of interest law violated an explicit provision of the Alaska Con-

168. *Id.* at 432, 467 P.2d at 567, 85 Cal. Rptr. at 839.

169. *Id.* at 432, 467 P.2d at 568, 85 Cal. Rptr. at 840. See also *Caesar v. Mountanos*, 542 F.2d 1064 (9th Cir. 1976).

170. 482 Pa. 471, 394 A.2d 419 (1978).

171. *Id.* at 477, 394 A.2d at 422. In *B*, a psychiatrist refused to release the records of a patient whose son had been adjudicated a delinquent, and for whom the court was attempting to determine proper placement. *Id.* at 475-76, 394 A.2d at 420-21.

172. The decision of the court was announced by Justice Manderino, with Justice Larsen concurring and Justice O'Brien concurring only in the result. Justice Roberts wrote a concurring opinion, stating that there was no need to reach the constitutional question because the psychiatric records were protected by the statutory privilege. *Id.* at 487, 394 A.2d at 427 (Roberts, J., concurring). In a dissenting opinion, Chief Justice Eagen recognized that there was a right of privacy to protect, but stated that the right should not prevail because of the "important state interest in treatment and welfare of juveniles." *Id.* at 494, 394 A.2d at 430 (Eagen, C.J., dissenting). Justice Pomeroy filed a dissenting opinion, in which Justice Nix joined, agreeing that the statutory privilege was inapplicable and arguing that the constitutional question had not been properly raised. *Id.* at 494, 394 A.2d at 430 (Pomeroy, J., dissenting).

173. *Id.* at 482, 394 A.2d at 424.

174. *Id.*

175. *Id.* at 486, 394 A.2d at 426.

176. 570 P.2d 469 (Alaska 1977).

stitution guaranteeing the right of privacy.¹⁷⁷ The *Falcon* court, balancing the nature of the privacy interest involved and the strength of the state interest requiring disclosure, held that the potential embarrassment which might be caused by compliance with the statute outweighed the state's interest in enforcing the statute.¹⁷⁸

In addition to these state court decisions, the scope of the privacy right was further delineated by the United States District Court for the Eastern District of New York in *Lora v. Board of Education*.¹⁷⁹ In *Lora*, the court addressed the issue of whether a constitutionally-based privilege precluded the plaintiffs in a civil rights case from obtaining discovery of diagnostic and referral files on emotionally handicapped children.¹⁸⁰ Referring to *Whalen*, the *Lora* court stated that the Supreme Court had identified three areas protected by the right to privacy:

The first is the right of the individual to be free in his private affairs from governmental surveillance and intrusion. The second is *the right of an individual not to have his private affairs made public by the government*. The third is the right of an individual to be free in action, thought, experience, and belief from governmental compulsion.¹⁸¹

The *Lora* court stated that it is the second interest, relating to "unwanted publicity," which is primarily involved in protecting an individual from unwanted disclosure of treatment for emotional disorders.¹⁸² Concluding that the privilege is of constitutional importance, the court explained that a person in therapy reveals information which he would not normally reveal to other persons.¹⁸³

177. *Id.* at 480. See ALASKA CONST. art. I, § 22. The statute required disclosure of the names of those patients from whom the doctor received more than \$100 annually. 570 P.2d at 470-71.

178. *Id.* at 480.

179. 74 F.R.D. 565 (E.D.N.Y. 1977).

180. *Id.* at 568. The plaintiffs alleged that the school district's standards for identification, evaluation, and educational placement of emotionally handicapped children were applied in an arbitrary and racially discriminatory manner. *Id.* In an effort to prove their allegations, the plaintiffs sought fifty randomly selected student diagnostic files. *Id.*

181. *Id.* at 574, quoting *Whalen v. Roe*, 429 U.S. at 599 n.24 (emphasis by the *Lora* court). The *Whalen* court had taken its language from *Kurland, The Private I*, U. CHI. MAGAZINE, 7, 8 (Autumn 1976). For discussion of *Whalen*, see notes 159-65 and accompanying text *supra*; notes 189-96 and accompanying text *infra*.

182. 74 F.R.D. at 574.

As these revelations often expose the most intimate details of a person's life, "their public disclosure may well strip him of much of his own sense of human dignity."¹⁸⁴ Due to the uniquely confidential nature of psychotherapy, the court reasoned, freedom from disclosure would encourage those in need of psychotherapy to seek help and reveal fully the information essential to proper treatment.¹⁸⁵

Although it recognized the existence of the privacy right in the psychiatrist-patient relationship, the *Lora* court stated that this right is not absolute.¹⁸⁶ Again relying upon *Whalen*, the court applied a balancing test and concluded that the balance of relevant factors was on the side compelling disclosure of the information sought.¹⁸⁷

2. Infringement of a Protected Area

Assuming that a psychotherapist-patient right of privacy exists, the second question that must be answered is whether there has been an infringement of that protected area.¹⁸⁸ In *Whalen*, the Supreme Court held that the constitutionally protected area had not been infringed.¹⁸⁹ Addressing the individual's interest in protection against disclosure of personal matters, the Court indicated that the interference was insufficient to result in a constitutional violation.¹⁹⁰ The Court found that the risk of negligent or deliberate public disclosure of the information was minimal,¹⁹¹ due to the security provisions of the statute,¹⁹² and that the concern over disclosure in a court hearing was unfounded, stating that "the remote possibility that judicial supervision of the evidentiary use . . . will

183. *Id.* at 571.

184. *Id.*

185. *Id.*

186. *Id.* at 567.

187. *Id.* at 572-74, 576-77, 587. The court analogized the procedural safeguards which negated the privacy right in *Whalen* to the procedure involved in *Lora* to assure anonymity for students whose records were examined. *Id.* at 572-74.

188. See note 150 *supra*.

189. *Whalen v. Roe*, 429 U.S. at 600. *Lifschutz* can be viewed in a similar way, as there was no infringement of the constitutionally protected area because there was a waiver of the privilege. For discussion of *Lifschutz*, see notes 166-69 and accompanying text *supra*.

190. See note 165 and accompanying text *supra*.

191. 429 U.S. at 601.

192. *Id.*

provide inadequate protection against unwarranted disclosures is surely not a sufficient reason for invalidating the entire patient-identification program.”¹⁹³

Addressing the privacy-autonomy interest in making certain important decisions, the Court rejected the argument that the person's choice was inhibited since a person could still decide, with the advice of a physician, that a certain drug was needed. The Court noted that “the decision to prescribe, or to use, is left entirely to the physician and the patient.”¹⁹⁴

In balancing the privacy right involved against the state's purpose for infringing upon that right, the *Whalen* Court apparently was using a reasonableness test. The opinion emphasized the need for the state to experiment with various methods of halting a growing drug problem.¹⁹⁵ This purpose, combined with the extensive statutory procedures protecting against disclosure, led the Court to conclude that the statutory scheme “was a reasonable exercise of New York's broad police powers.”¹⁹⁶

The infringement involved in the psychotherapist-patient context is greater than in *Whalen*, as the nature of the matter disclosed is substantially more personal. The United States District Court for the District of New Jersey recognized this distinction in *McKenna v. Fargo*.¹⁹⁷ In *McKenna*, applicants for jobs as firefighters were required to submit to a series of psychological tests and evaluations.¹⁹⁸ Holding that this was an infringement of a constitutionally protected area, the *McKenna* court distinguished *Whalen*, on the ground that both “the degree and character of the disclosure [were] far greater and more intrusive” in *McKenna* than in *Whalen*.¹⁹⁹ While the information disclosed in *Whalen* consisted of only the patient's identity and his use of a certain drug, the evaluations in

193. *Id.* at 601-02. The court analogized the possibility of disclosure to employees of the health department who had access to the files with disclosures commonly made to doctors, hospital personnel, and insurance companies. *Id.*

194. *Id.* at 603.

195. *Id.* at 598.

196. *Id.*

197. 451 F. Supp. 1355 (D.N.J. 1978), *aff'd*, 601 F.2d 575 (3d Cir. 1979). For further discussion of *McKenna*, see notes 215-18 and accompanying text *infra*.

198. 451 F. Supp. at 1359-63. The tests were administered to determine whether the applicant could withstand the pressures inherent in firefighting. *Id.* at 1357.

199. *Id.* at 1380.

McKenna looked "deeply into an applicant's personality."²⁰⁰ The fact that there was no public disclosure of the information was found to be irrelevant since "the amount of information given to the Government alone was itself an intrusion" ²⁰¹ Although the court concluded that the tests were constitutional because the intrusion on the plaintiffs' privacy rights was justified by compelling state interests,²⁰² it is clear that under the standard applied in *McKenna* there would be an intrusion upon the psychotherapist-patient privilege in a child placement case. Indeed, the *McKenna* court used the private psychotherapist-patient relationship as a standard by which to judge the severity of the intrusion upon the applicant.²⁰³

3. Sufficient State Interest to Justify Intrusion

Once it is established that a privacy interest is involved and a governmental intrusion has occurred, the third question which a court must address is whether there is a sufficient state interest to justify the intrusion.²⁰⁴ Generally speaking, the Supreme Court has indicated that the right of privacy is fundamental, requiring the application of the compelling state interest test, rather than the rational relationship test.²⁰⁵ There is some indication, however, that in certain instances a lesser state interest may justify intrusion upon privacy rights. In *Whalen*, for example, the Court spoke of the reasonableness of the state's actions as a reason for the lack of an infringement.²⁰⁶

In any event, since the state can meet the compelling interest standard in child custody cases, the problem need not be resolved here. One would be hard pressed to find a state interest which is more compelling than the protection of the welfare of children. Indeed, the *parens patriae* doctrine, underlying the state's regulation

200. *Id.*

201. *Id.* at 1381.

202. *Id.* at 1381-82. See notes 204-05 *infra*.

203. The *McKenna* court pointed out that the intrusion caused by the evaluation was in degree and character equal to the situation in which one engaged a private psychologist. 451 F. Supp. at 1380.

204. See note 150 *supra*.

205. *Id.* The Court's clearest articulation of the compelling state interest requirement has been in the abortion cases. See, e.g., *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Doe v. Bolton*, 410 U.S. 179 (1973); *Roe v. Wade*, 410 U.S. 113 (1973). See note 155 *supra*.

206. *Whalen v. Roe*, 429 U.S. at 598. For discussion of *Whalen*, see notes 159-65 & 189-96 and accompanying text *supra*.

of various aspects of the child's life, is an articulation of this compelling interest.²⁰⁷

4. *Intrusion Narrowly Circumscribed*

As with the question of compelling state interest versus rational relationship, the permissible extent of the state's infringement upon the privacy right is unclear. Generally, once a right is determined to be fundamental, and assuming there is a compelling state interest, the state's intrusion must be narrowly circumscribed.²⁰⁸ Although the "least restrictive alternative" requirement has not been universally applied, under either that analysis or a rational relationship test, the state may not require the blanket disclosure of a proposed custodian's psychological records in a custody determination without some reasonable justification. Given the uncertainty of finding relevant information, blanket disclosure bears no reasonable relationship to the state's interests. In many, if not most of these cases, the state's compelling interest may be satisfied by less than full disclosure. Further, in certain circumstances the state's interest is greater than in others. Therefore, a state's system of intrusion should be adaptable to different circumstances.²⁰⁹

This analysis has been applied to other issues arising in child custody decisions.²¹⁰ For example, one area in which there has been a great deal of conflict between a parent's rights and the court's need to determine the best interests of the child is in custody cases involving homosexual parents. Traditionally, courts have treated homosexuality as an absolute bar to custody.²¹¹ A growing number of jurisdictions, however, require a nexus between a parent's homosexuality and harm to the child.²¹²

One of the rationales underlying this nexus requirement has been the recognition of a constitutional right of privacy. The posi-

207. See Burt, *Developing Constitutional Rights Of, In, and For Children*, 39 LAW & CONTEMP. PROB. 118 (Summer 1975); Garvey, *supra* note 1, at 796.

208. See NAACP v. Alabama, 377 U.S. 288 (1964). In NAACP, the Court stated that "a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *Id.* at 307.

209. See notes 232-33 and accompanying text *infra*.

210. For discussion of one of these issues, that of subordinating parents' right to the best interests of the child, see Comment, *supra* note 1, at 733-37.

211. See Commonwealth *ex rel.* Bachman v. Bradley, 171 Pa. Super. Ct. 587, 91 A.2d 379 (1952).

212. See, e.g., Nadler v. Superior Court, 255 Cal. App. 2d 523, 63 Cal. Rptr. 352 (1967); Christian v. Randall, 33 Colo. App. 129, 516 P.2d 132 (1973); People v. Brown, 49 Mich. App. 358, 212 N.W.2d 55 (1973).

tion taken by some of the commentators is that a parent's sexual preference is an interest protected by the right of privacy and the state's refusal to allow the parent to have custody, if based solely on such preference, is an infringement of that right.²¹³ Thus, the state must have a compelling interest to infringe upon that right. As in all child placement cases, it is hard to deny that there is such a compelling state interest. The courts and commentators have gone on to say, however, that since the constitutional privacy right requires the state to demonstrate a relationship between its interest and its activity, the state may not make homosexuality a *per se* disqualification, but must establish a nexus between homosexuality and harm to the child.²¹⁴

The court in *McKenna* used a similar analysis once it had determined that there was a constitutional infringement of the privacy right and that there was a compelling state interest in requiring the examination and other hiring procedures.²¹⁵ The court held that the procedure was not as narrowly drawn as it should be and, while holding the scheme constitutional, required additional protections aimed at limiting access to the records.²¹⁶ To protect the individual, the court directed the defendant to promulgate rules and sanctions which would limit its employees' access to the data to situations in which there was a "need to know."²¹⁷ Further, the court required the defendant to set a reasonable limit on how long the records would be retained before destruction.²¹⁸ The court's adoption of these requirements evidences the same concern as that expressed by the Supreme Court in *Whalen*, namely, protection against unwarranted disclosure.

B. A Suggested Analysis

The *Lora* court proposed a balancing test which was similar to both the Rule 35 good cause test and the *Hickox* test.²¹⁹ In its balancing process, the *Lora* court asked four questions: 1) is identi-

213. See, e.g., Hunter & Polikoff, *Custody Rights of Lesbian Mothers*, 25 BUFFALO L. REV. 691 (1976); Lauerman, *supra* note 3, at 690; Riley, *The Avowed Lesbian Mother and Her Right to Child Custody: A Constitutional Challenge That Can No Longer Be Denied*, 12 SAN DIEGO L. REV. 799 (1975).

214. See notes 212 & 13 *supra* and authorities cited therein.

215. *McKenna v. Fargo*, 451 F. Supp. at 1380-81. For further discussion of *McKenna*, see notes 197-203 and accompanying text *supra*.

216. 451 F. Supp. at 1382.

217. *Id.*

218. *Id.*

219. See notes 114-17 *supra*.

fication of the individuals required for effective use of the data; 2) is the risk of harm minimized; 3) will the data be supplied only to qualified persons in strict confidence; and 4) is the information necessary or merely desirable?²²⁰ In weighing the answers to these questions, the court held that the interest in compelling disclosure was the greater.²²¹ In reaching a decision, the court relied on its authority to issue a confidentiality order and on the anonymous nature of the information disclosed.²²²

The factors considered in this analysis suggest that an alternate analysis, like the one proposed previously for statutory privileges,²²³ might also be of benefit in the constitutional context. The constitutional nature of the protection, however, would require an even greater showing of good cause than mere logical relevancy. Indeed, the constitutional mandate would indicate that the necessity requirement is paramount.

To accomplish the difficult task of specifically delineating what must be shown to justify intrusion into the psychotherapist-patient privilege, the four-part inquiry used in *Lora* provides guidelines that are consistent with the suggested analysis: since the scope of the disclosure can be limited by using traditional relevancy analysis and access to the data can be limited to only qualified persons in strict confidence by the exercise of judicial supervision, harm can be minimized. Judicial supervision was recognized as a sufficient protection in *Whalen*, and the District of Columbia, for example, has a statute which limits access to court records in child placement determinations.²²⁴

Determining whether the information is necessary or simply desirable, however, raises a more difficult question. It is submitted that the way to address the question is for the court to require a court-appointed psychiatric evaluation prior to determining access to past psychotherapy records.²²⁵ This procedure would provide a

220. *Lora v. Board of Educ.*, 74 F.R.D. at 579. For discussion of *Lora*, see notes 179-87 and accompanying text *supra*.

221. 74 F.R.D. at 583-84.

222. *Id.* at 582-83.

223. See section IIC *supra*.

224. See D.C. CODE ANN. § 16-2335 (Supp. 1978).

225. This was the procedure followed by the court in *Perry v. Fiumano*, 61 A.D.2d 512, 403 N.Y.S.2d 382 (1978). For discussion of *Perry*, see notes 107-11 and accompanying text *supra*. The court stated that it would order production of the respondent's records only if they were necessary to the court-appointed psychiatrist in his "complete evaluation of respondent's mental and emotional condition." 61 A.D.2d at 520, 403 N.Y.S.2d at 387.

narrowly-circumscribed method for determining necessity and would have several advantages in protecting against unnecessary disclosure.

Since the referral is not for treatment, but solely for the purpose of the litigation, the parties should be aware of the purpose for establishing the relationship so they can act accordingly. Indeed, it might be best if persons being evaluated were told that the psychotherapist's report is not privileged. The second advantage, which addresses the question posed in *Lora* of whether the equivalent of the privilege exists, is that the court-appointed psychotherapist may well be able to acquire more relevant information than is available from either past treating psychotherapists or their records. And, as Professor Slovenko points out, because of the nature of psychotherapy, treating psychotherapists often keep no records.²²⁶ Further, even if they do, a psychotherapist appointed to explore a specific legal problem may acquire more relevant information than one who has been seeing the party for therapy totally undirected towards the legal issue.²²⁷ If the court-appointed psychotherapist wanted to review the privileged records, an inquiry into their relevance could be made looking to the factors discussed above. Indeed, this procedure would be a direct showing that the state's method was reasonably related to its interest.²²⁸

This procedure was followed in *In re B*.²²⁹ In that case, although it was a court-appointed psychotherapist who instituted the request to see the records, the Pennsylvania Supreme Court found the intrusion unjustified.²³⁰ The best alternative available, the court held, was for the mother to volunteer for a court-appointed examination.²³¹

It must be questioned whether *In re B* would apply to all situations involving the best interests of the child. As mentioned

226. Slovenko, *supra* note 98, at 651.

227. *Id.* at 662.

228. See e.g., *Roper v. Roper*, 336 So. 2d 654 (Fla. App. 1976); *Perry v. Fiumano*, 61 A.D.2d 512, 403 N.Y.S.2d 382 (1978). For discussion of *Roper*, see notes 73-78 and accompanying text *supra*. For discussion of *Perry*, see notes 107-11 & 225 and accompanying text *supra*.

229. 482 Pa. 471, 394 A.2d 419 (1978) (opinion of only a minority of the court). For discussion of *B*, see notes 170-75 and accompanying text *supra*. See also *Miller v. Colonial Refrigerated Transp., Inc.*, 81 F.R.D. 741 (M.D. Pa. 1979). In *Miller*, a personal injury action, the court discussed *In re B*, concluding that the constitutional privilege, even if it exists, is not absolute, and denied a motion to quash a subpoena for the plaintiff's psychiatric records.

230. 482 Pa. at 484-86, 394 A.2d at 425-26.

231. *Id.* at 486, 394 A.2d at 426.

above,²³² the state's interest in different types of proceedings may vary. For example, does the fact that B was adjudicated a delinquent affect the state's interest? It could be argued that because the mother was not a party to the action the court's powers should be more limited. Such an argument, however, parallels the reasoning of the Florida cases discussed above²³³ which made relevancy a question of who brings the suit — the party seeking disclosure or the party trying to avoid disclosure.

A more persuasive argument may be that the state's interest in B was ever greater than in a private custody action since B, adjudicated a delinquent, was a person in whom the state had a special concern. This would also lead to the conclusion that in dependency or neglect cases the state's interest also is greater. The allowable intrusion, therefore, should be greater since a demonstrative problem will have been shown, although with one of the potential custodians, rather than with the child.

More fruitful than either of these arguments, however, would be a consistent approach. Since in all instances the question is what is best for the child, the state's interest remains the same and the court should rely on an analysis with the varying degrees of relevancy as the distinguishing factor. If, for example, a nexus can be established between the parent and his mental fitness to care for the child, the court-appointed psychotherapist can initiate a request for the privileged records. The reviewing judge, after a hearing, may then allow a greater intrusion only upon a showing of need.²³⁴

IV. CONCLUSION

If necessary to a proper placement decision, testimony from a privately-retained psychotherapist should be considered. In light of the strong reasons for the existence of the statutory privilege and the demands of the constitutional right of privacy, however, the decision to permit such testimony deserves a more logical treatment than it has heretofore received.

A court should not unquestioningly allow unrestricted access into the psychotherapist-patient relationship as is often done under traditional privilege analysis. Less intrusive means of obtaining the information often exist. In addition, the value of a psychotherapist's

232. See note 209 and accompanying text *supra*.

233. See notes 73-98 and accompanying text *supra*.

234. See generally Slovenko, *supra* note 98, at 659 n.21; Weihofen, *supra* note 7, at 80.

testimony stemming from a relationship not specifically directed to the question of custody is questionable. These considerations suggest that unrestricted intrusion is not always necessary. An analysis premised on deductive reasoning as a basis for determining relevancy provides a sound framework for establishing when the psychotherapist-patient privilege should be breached.